

BEFORE THE NATIONAL LABOR RELATIONS BOARD  
UNITED STATES OF AMERICA  
REGION 19

BEECHER'S HANDMADE CHEESE, LLC

Employer

and

Case 19-RC-14486

UNITED FOOD AND COMMERCIAL WORKERS  
UNION, LOCAL #1105, Chartered by UNITED  
FOOD AND COMMERCIAL WORKERS  
INTERNATIONAL UNION, AFL-CIO, CLC

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Based upon the entire record in this proceeding,<sup>1</sup> the undersigned makes the following findings and conclusions.<sup>2</sup>

**I) SUMMARY**

The Employer has a dual-operation facility located at the Pike Place Market in Seattle, Washington. The Employer's operations consist of cheese production and a small café/retail facility, which provides soups and sandwiches and other products. The Petitioner filed the instant petition seeking to represent all hourly café/retail employees at the Employer's Pike Place Market location, excluding supervisors, confidential employees, and guards as defined by the Act.<sup>3</sup> The parties disagree whether the Assistant General Manager and three Managers On Duty (MODs) should be included in the unit. The Employer contends the Assistant General

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<sup>1</sup> The parties timely submitted their respective briefs, which were duly considered.

<sup>2</sup> The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claims to represent certain employees of the Employer and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

<sup>3</sup> During the hearing, the Employer and the Petitioner stipulated that Lisa Evans, the Café/Retail General Manager, Bradford Sinko, the Cheese Maker Manager, and Amir Rosenblatt, a cheese maker production employee were either statutory supervisors and/or a lacked community of interest with the petitioned-for unit and, therefore, these employees should be excluded from the unit. In view of the parties' stipulation and the record evidence, I shall exclude the Cheese Maker Manager, the Café/Retail General Manager, and the cheese maker production employee from the unit.

Manager and the MODs are supervisors within the meaning of Section 2(11) of the Act and, therefore, should be excluded from the unit. The Petitioner contends that the Assistant General Manager and MODs are not supervisors and, therefore, should be included in the unit.

Based on the record evidence and arguments presented by the parties, I have found that the Employer has failed to meet its burden of proving that the MODs are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I shall include them in the unit sought by the Petitioner. Additionally, I have found that the evidence is insufficient to determine whether the Assistant General Manager is a supervisor within the meaning of Section 2(11) the Act. Consequently, I shall permit the Assistant General Manager to vote subject to challenge.

Below, I have provided a section setting forth the evidence, as revealed by the record in this matter, relating to background information about the Employer's operations and about the duties and responsibilities of the Assistant General Manager and MODs. Following the presentation of the evidence, I have provided a brief summary of the parties' positions and a section analyzing the evidence based on applicable legal standards. The decision concludes with a direction of election and the procedures for requesting a review of this decision.

## **II) EVIDENCE**

### **A) Background Information about the Employer's Operations**

The Employer began operations at the Pike Place Market in Seattle, Washington on November 20, 2003. The Employer operates a dual-function facility consisting of a cheese production operation and a café/retail store.<sup>4</sup> The Employer's cheese production operation produces specialty cheeses for sale to the local retail and consumer markets. The Employer's café/retail facility serves a lunch menu of soups and sandwiches and sells artisan cheeses and cheese accessories (knives, books, etc.). The café/retail facility operates seven days a week, from 9:00 AM to 6:00 PM Monday through Saturday and from 10:00 AM to 5:00 PM on Sundays. However, there are employees present in the café/retail facility from 7:00 AM to 7:00 PM everyday. The Employer's café/retail facility is currently staffed by twelve people including the General Manager, the Assistant General Manager, the three MODs, three full time café/retail employees, and four part-time café/retail employees.

The Employer's café/retail facility is essentially a line operation with employees filling one of seven positions. The positions are: 1) Pivot - greets customers, takes orders and directs people down the line; 2) Press Sandwich Maker - makes sandwiches; 3) Hot Food - serves soups and other hot foods; 4) POS (Point of Sale) Food - operates cash register for food purchases; 5) POS Cheese - operates cash register for cheese purchases; 6) Manager; and 7) Concierge - greets customers and explains the Employer's operations. Recently, several of the café/retail employees have been working some hours in cheese production on an intermittent basis.

Kurt Dammeier is the Owner of the Employer's operations but the record contains no evidence that he is involved in the hiring of personnel or establishing of operating procedures for the Employer. Rather, Sugar Mountain Guest Services (SMGS), a support service provider for the Employer, established the Employer's initial operating procedures.<sup>5</sup> The President of SMGS

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<sup>4</sup> The instant petition does not cover the Employer's cheese production operations. Rather, only the café/retail operations are covered by the petition.

<sup>5</sup> The parties did not clarify the nature of the relationship between the Employer and SMGS. According to witness testimony, SMGS neither owns nor is owned by the Employer and SMGS is not employed by the Employer. Despite the lack of clarity on this point, it appears from the record that SMGS has a close relationship with the Employer and has overall control of the operations and management of the Employer's Pike Place Market operations.

is Rene Briede. SMGS and Briede created the Employer's menu, selected and trained the initial cohort of employees, and drafted the employee handbook, which applies to all of the café/retail employees, except the Café/Retail General Manager. SMGS and Briede currently provide information technology and human resource support to the Employer.

## **B) Disputed Supervisory Positions**

### **1) Assistant General Manager**

The Employer opened its café/retail facility on November 20, 2003. Prior to opening, Briede hired and trained twelve employees, including former Café/Retail General Manager Matt Chastain. Darren Vickers was hired on November 10, 2003. Briede selected Blain Hages, Melissa Corwin and Darren Vickers to be MODs. Shortly after opening, however, Chastain quit working for the Employer. After Chastain left, Briede asked Vickers if he was interested in becoming the General Manager. Briede testified that he was unsure if Vickers had the skills necessary to be the General Manager and, so, he offered Vickers the opportunity to become Acting General Manager on a trial basis. Vickers accepted the offer (with a pay increase to \$15.00 per hour) and assumed the Acting General Manager position on November 20, 2003. He held that position until late January 2004, approximately two weeks prior to the hearing in this matter.

Sometime in January 2004, Briede informed Vickers that he did not have enough experience to be the General Manager. Briede also informed Vickers that when the new General Manager began working, Vickers would become the Assistant General Manager and would continue to receive management training. In late January 2004, approximately two weeks before the hearing in this matter, SMGS hired a new General Manager, Lisa Evans, and Vickers became the Assistant General Manager. Vickers' pay did not change after he became the Assistant General Manager.

#### **a) Vickers' Acting General Manager's Duties and Responsibilities**

The Employer does not have a written job description for the General Manager. However, on December 13, 2003, Briede e-mailed to Vickers a list of minimum expectations of the General Manager. Vickers denied having received the document, but acknowledged that such duties were expected of him. The list of expectations is titled "General Manager expectations" and includes, among other things, hiring and training of new employees, ensuring that "two leads" manage the store while he is absent, completing staff schedules, completing the necessary paper work for hiring and firing employees, and understanding with competence how to handle emergency situations.

While Vickers was Acting General Manager, he hired several employees. According to both Briede and Vickers, the hiring process involved advertising for the position, accepting applications, interviewing applicants, and offering acceptable applicants positions with the Employer. Vickers testified that he hired seven employees. One of these employees, Gypsy Walukones, testified that Vickers had interviewed and hired her. There is no evidence in the record that Briede was involved in the interviews or in the decision to hire these employees other than instructing Vickers to hire additional employees and presenting a potential applicant. The Employer has not hired any employees since December 2003, and, thus, Vickers has not been involved in any hiring decisions since becoming the Assistant General Manger.

While Vickers was Acting General Manager, he also laid off and discharged several employees. With regard to layoffs, in late December 2003, the Employer experienced a downturn in business. Briede asked Vickers to assess the staff and recommend who should be laid off. After making his assessment, Vickers selected several employees and presented them to Briede. Briede and Vickers discussed his selections and Vickers agreed to lay off the

selected employees. Briede and Vickers also testified that Vickers was responsible for the discipline and discharge of three named employees. The Employer has not laid off or terminated any employees since Evans became General Manager and Vickers became the Assistant General Manager.

Additionally, while Vickers was Acting General Manager, Vickers had the authority to effectively recommend promotions. After Vickers became the Acting General Manager, the Employer needed to fill the empty MOD position. Vickers effectively recommended to Briede that Dean Volker should fill the vacant MOD position. Vickers testified that Briede agreed with this recommendation and that Vickers implemented Volker's promotion. Vickers also testified that as the Acting General Manager, he had an active role in evaluating employees' performances and generally training the employees when needed.

In addition to Vickers' authority to hire, fire, lay off and promote employees, Briede testified that Vickers had the authority to send people home. On several occasions during inclement weather, Briede directed Vickers to send specific people home. Vickers testified that when Briede did not specify whom to send home, Vickers would take volunteers and, if there were no volunteers, he would chose an individual to go home. Vickers also testified that while he was the Acting General Manager he was responsible for completing the work schedule and the payroll.

#### **b) Vickers' Assistant General Manager Duties and Responsibilities**

As previously mentioned, two weeks prior to the hearing in this matter, Vickers ceased being Acting General Manager and assumed the position of Assistant General Manager. The record does not contain a written job description for the Assistant General Manager or a description of the Assistant General Manager's duties. Vickers stated that he has not been introduced to the employees as the Assistant General Manager, other than to Lisa Evans. As stated above, neither Vickers nor Evans has hired, fired, or laid off any employees since Evans became the General Manager and Vickers became the Assistant General Manager. Although neither Evans nor Briede have told Vickers that he no longer possesses the authority to hire, fire and layoff employees, Vickers testified that he assumed he no longer had that authority.<sup>6</sup> Vickers also testified that he believed he would no longer have a significant role in evaluating employees, disciplining employees, or sending employees home. Briede testified that there was no change to Vickers' long-term program and that he would continue to be trained to be General Manager.<sup>7</sup> Briede also testified that Vickers would have "a great role" in the hiring of new employees for the approaching summer. However, Briede admitted that he has not yet communicated this role to Vickers.

During the week, Vickers spends each Monday with Evans completing administrative tasks, including ordering products, speaking with vendors, checking the employees' schedules and assisting with payroll. Vickers orders, from ten to twelve vendors, various products totaling \$35,000 to \$40,000 dollars in a normal month. Vickers has substantial discretion to decide what to order, in terms of both products and quantities.

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<sup>6</sup> Vickers did not provide any additional basis for his belief that he no longer possesses the authority to hire, fire, or lay off employees. Rather, Vickers reasoned that, if he continued to have the authority of the General Manager, he would butt heads with the new General Manager.

<sup>7</sup> Several times during the hearing, Briede mentioned that Vickers, despite his demotion, would continue to receive training for the General Manager position. The record, however, is devoid of evidence as to nature and extent of this training program.

Vickers testified that, since he has become Assistant General Manager, he has been training Evans on the payroll system and providing her with assistance when needed. Vickers further testified that, since he became Assistant General Manager, there have been two payrolls. The first payroll he completed with Evans, showing her the process. The second payroll was completed by Evans. Vickers testified that he believes he is no longer responsible for completing the payroll. Briede testified that Evans was only receiving training so that she understands how to complete payroll. Briede testified that he believes Vickers still has payroll duties and that overall there would be no long-term changes to Vickers' payroll duties. Specifically, Briede testified that Vickers continues to have the authority to correct employees' hours if they forgot to clock out or to make adjustments to employees' time if needed. There is no evidence in the record that Vickers has corrected an employee's hours since becoming Assistant General Manager.

Vickers also testified at the hearing that he had trained Evans to complete the work schedule and that he is no longer significantly involved in that task. Briede testified that Vickers will continue to assist with the scheduling in specific ways, such as scheduling employees to work in cheese production. Vickers testified that since becoming the Assistant General Manager, he has scheduled several of the café/retail staff to work some hours in cheese production. Vickers testified that Cheese Production Manager Bradford Sinko approached him about having some of the café/retail staff work in cheese production. Vickers testified that, since becoming Assistant General Manager, he has asked several employees if they were interested in working in cheese production. Vickers testified that certain employees expressed an interest and, pursuant to that interest, he scheduled them to work in cheese production.

On Saturdays, Vickers acts as the concierge, which includes welcoming people into the Employer's facility and explaining the facility and the cheese making process. Other than Mondays and Saturdays, Vickers spends the remainder of the week working as an MOD in various positions throughout the Employer's facility. Vickers testified that when he serves as the MOD, he has the same responsibility as the other MODs. Briede testified that this is generally true, but that Vickers has greater responsibility based on situations that may arise. Vickers primarily spends his time as MOD at the cash register. Vickers testified that during the week, he spends about 70% of his time engaged in the same tasks as the other employees.

## **2) Managers-On-Duty<sup>8</sup>**

### **a) Background**

The current MODs are Melissa Corwin, Blain Hages and Dean Volker.<sup>9</sup> All three MODs were hired before the Employer opened on November 20, 2003. Matt Chastain and Rene Briede started training all of the employees before the Employer opened. During the training, Chastain and Briede chose Corwin, Hages and Darren Vickers to be MODs. As mentioned above, after Chastain left, Vickers became the Acting General Manager and Dean Volker became a MOD.

At least two of the three MODs work in the café/retail facility every day, one in the morning and one in the afternoon with an overlap of generally 3 to 4 hours. Darren Vickers, the Assistant General Manager, is scheduled as a fourth MOD on each day that he works, except for Monday, which is his administrative day. The remaining three MODs rotate through the position, working as an MOD on some days and as a regular employee on other days during the

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<sup>8</sup> Although the term "MOD" was used throughout the hearing, the Employer's documentary evidence also uses the terms "lead," "retail lead" and "manager lead" to describe the same position.

<sup>9</sup> Both Blain Hages and Dean Volker testified at the hearing.

week. For example, during the week of January 26, 2004, through February 1, 2004, Corwin worked as a MOD for 2 days and a regular employee for 3 days, Hages worked as a MOD for 4 days and in cheese production for 1 day, and Volker worked as a MOD for 3 days and a regular employee for 2 days. Briede testified that when there is more than one of the MODs present in the café/retail facility, neither is "in charge." Rather, the MODs share authority. Briede testified that he did not know how a conflict would be resolved if one arose between the MODs.

In addition to the MODs, Rene Briede and the General Manager, Lisa Evans, have a regular presence in the Employer's café/retail facility. Briede testified that he was in the Employer's café/retail facility for various lengths of time, five days a week through the beginning of January 2004. Briede testified that since the beginning of January 2004, he normally visits the facility two to three times each week. Additionally, Evans is also present in the Employer's facility on a regular basis; however, the record is unclear as to exact amount of time Evans spends at the facility. According to Briede, Evans makes her own schedule. During the week of January 19 through January 25, Evans was training at the Employer's facility for approximately forty hours. Briede testified that if Evans is working but not at the Employer's facility, then she is approximately 100 yards away, at SMGS' office. Briede also stated that Evans is available by phone and that there is a phone list at the Employer's facility with the managerial officials' phone numbers, including Evans' and Briede's phone numbers.

With respect to pay, the MODs were all hired at \$8.00 per hour but were subsequently increased to their current level of \$12.00. Corwin and Hages have made \$12.00 per hour since the Employer opened regardless of whether they worked as a regular employee or a MOD. However, after Volker became MOD, he made \$12 an hour while working as a MOD and \$11.00 while working as a regular employee. In late January 2004, Volker raised this issue with the owner, Kurt Dammeier. Dammeier corrected the discrepancy and Volker now makes \$12.00 regardless of whether he works as an MOD or a regular employee. All the other employees make between \$9.00 and \$12.00 per hour. Other than the MODs, one other employee, Caitlin Robertson, earns \$12.00 per hour.<sup>10</sup>

#### **b) Authority to Discipline**

Both Briede and the two MOD witnesses testified that it was the MODs' responsibility to ensure that the employees did their jobs and complied with the Employer's "employee handbook." Briede testified that the MODs have Evans and Vickers' authority when they are not present. There is nothing in the record that demonstrates that the MODs have been involved in the hiring or firing of employees or possess the authority to hire or fire employees. During the hearing, the Employer introduced a list of MOD expectations, which includes the expectation that the MODs provide coaching to other employees on staff performance issues when needed. Although, the record is unclear as to what coaching entails, other than Briede testified that the Employer expects the MODs to coach other employees on how to do their respective jobs.

Both MOD witnesses testified that they have not disciplined other employees and were not aware that they had the authority to discipline other employees. Volker testified that if an employee were not complying with the employee handbook, Volker would talk to them. Volker testified that if this did not work, he did not know what further actions he should take. Hages testified that he had the authority to insist the employees follow the operating procedures in the handbook and that he had the authority to correct an employee who was misbehaving. Hages further testified that he did not know the scope of his authority to discipline employees or what

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<sup>10</sup> The Employer stated the Robertson's wage was based on the Employer's fulfillment of a promise the previous General Manager, Matt Chastain, made to Robertson. That being said, the evidence remains Robertson, a conceded employee, earns the same wages as the MODs.

kind of discipline he could enforce. Hages testified that if he had a problem with someone not complying with his instructions, he would simply contact a higher-level manager.

The only incident of discipline in the record was the discipline and eventual termination of John Persak. Briede testified that Persak had become displeased about something and left the store without permission. Briede sat down with the MOD, Corwin, and asked her for her opinion about the situation. Briede testified that Corwin recommended that Persak should be terminated. Corwin and Briede further conferred with Vickers. Vickers felt that Persak should be given another chance. Corwin agreed to meet and discuss the situation with Persak. Vickers also met with Persak and relayed their displeasure with his conduct. As mentioned above, Vickers subsequently fired Persak because his conduct failed to improve.

### **c) Authority to Assign Work**

The Employer has a checklist for the opening and closing procedures, separated into sections for Café, Prep, Retail, Cheese Case, and Manager. Each section lists between ten and twenty-five different tasks for employees. An example of various checklist tasks include pulling back the soups for cooling, re-stocking the beverage case, placing the hard cheeses in the cheese case, restocking the crackers, checking signage, ensuring that items are properly dated, and assorted other tasks. The checklists contain specific responsibilities for the MODs in the Manager section, including opening up the doors, turning off the alarms, checking the logbook, turning on the music, turning on the lights, closing down the tills, collecting the tills, preparing the bank deposit, and closing down the computer. In addition to these specific responsibilities, Briede testified that MODs are responsible for assigning and directing employees to complete the checklist during opening and closing. Briede testified that, in addition to opening and closing, MODs assign employees to cover positions based on the amount of business and number of employees on staff. The closing checklist provides in the Manager section that managers are responsible for assigning closing checklists to staff. Briede testified that he is generally not present during opening and closing of the Employer's facility and is unsure of the extent of the MODs' assignment of specific tasks.

MOD Volker testified that he does not assign work to a great extent because the work tasks are relatively routine and the checklist provides most of the specific tasks that need to be completed. Generally, when Volker is MOD, the employees work things out among themselves. For example, employees draw straws for the cleaning the bathroom. However, the senior people direct the newer people and Volker is more likely to assign work to a newer employee. In making an assignment, Volker testified that he would take into consideration the employee's qualifications and interests. Volker also testified that he checks to make sure all of the items on the checklist are complete by looking at the work areas and making sure all the items are initialed on the list. However, Volker does not require that the list be followed precisely. For example, Volker testified that the employees have never engaged in a "Team Pow-Wow" prior to the opening of the café. In addition to the list, Volker testified that he would ask employees to take the trash out or move to a position if it looks busy. Volker testified that, overall, his directions to other employees are very minimal, constituting only 5% of his time.

MOD Hages provided testimony similar to that of MOD Volker. Hages stated that the work was fairly routine, such as taking out the trash and cleaning the countertops. Hages stated that he did not generally assign tasks. Hages also testified that other non-MOD employees have asked him to do things. Hages provided an example of Robert Stephen Best, who was making sandwiches, asking Hages to go to the market for tomatoes. Hages also testified that he engages in similar conduct when he is not working as the MOD. Employee Gypsy Walukones also testified that the extent of the MODs' assignments is very limited and the work is generally routine. Walukones stated that, while she is working, she looks for openings and

works where an opening is available. Walukones is aware that the MOD is in charge and that if she is unable to find an opening she would ask an MOD where she should work. However, Walukones testified that the majority of the time, during opening and closing, employees agree among themselves on the tasks that they should perform.

#### **d) Other Duties and Responsibilities**

Briede testified that, in addition to the authority to discipline and assign work described above, the MODs have numerous other responsibilities. For example, employees are entitled to one free meal per day, consisting of a sandwich or soup. The MODs have the access codes to ring up the employees' meals at the cash registers. Similarly, the MODs have the cash register access codes for ringing up employee discounts, voiding transactions, processing refunds, and issuing gift certificates. MODs also have the alarm codes and keys to enter and close the facility. Briede testified that MODs engage in some training activities, such as how to operate the cash register and how to properly identify and treat cheese in the cheese case. During closing, MODs are the only employees responsible for counting the tills, reporting shortages to Evans, closing down the computer, and making bank deposits.

Briede testified that the MODs are expected to provide feedback to management during employee evaluations. Briede further testified that the Employer has just begun operations and the Employer has not yet completed employee evaluations. However, both Briede and Volker testified that the MODs had not been informed of this role in the evaluation process. Additionally, the Employer's list of MOD expectations does not include anything regarding input from MODs during employee evaluations.

Briede testified that MODs are also responsible for allowing employees to take their breaks and ensuring that there is another employee to cover for the employee while he or she is on break. However, Briede testified that he has not seen how breaks are handled on a regular basis. Walukones testified that she would usually ask an MOD if she could take her ten-minute break. Volker also testified that he had the authority to determine when people take their ten-minute rest breaks. Volker testified that he almost always allows people to take their break when they ask, unless it is unusually busy. Hages testified that he has never refused any employees' request to take a break. He further testified that employees are generally aware of the time and only request a break when it is appropriate to take one.

Briede stated that the MODs have the authority to call for extra help or keep an employee longer if someone does not show up or the Employer's facility is otherwise understaffed. In these situations, MODs would have the authority to approve overtime for employees. Briede also testified that the MODs have the authority to send employees home early if the Employer's facility is overstaffed. Although Briede testified that the MODs have the above authority, Briede further testified that he did not have any direct knowledge that the MODs had ever exercised this authority.

Walukones testified that she had never been asked to stay late. Walukones further testified that, on one occasion, the business was slow and there were discussions between SMGS and Vickers or the MOD about sending someone home. It was decided that someone should be sent home and one of the employees volunteered to leave work early. Volker testified that, if he thought things were slow, he might ask the other employees if someone should go home, but he has never made the decision to send someone home. Volker testified about an incident in which there were no customers and things were slow. The employees came to a consensus that they were over staffed and an employee volunteered to go home. Volker testified that he did not direct the employee to go home. Volker further testified that he does not believe he has the authority to require an employee to stay late, work overtime, or call an employee in to work.

### **III) POSITIONS OF THE PARTIES**

The Employer contends that the Assistant General Manager and the MODs are supervisors as that term is defined by Section 2(11) of the Act. In support of that contention, the Employer argues that the MODs are supervisors because they are responsible for assigning work to other employees, for directing employees in that work, and for disciplining employees. Additionally, the Employer argues that the MODs' supervisory status is supported by secondary indicia. The Employer further argues that the Assistant General Manager is a supervisor because he did not significantly lose the authority he possessed prior to his demotion.

Contrary to the Employer, the Petitioner contends that the Assistant General Manager and the MODs are not supervisors within the meaning of Section 2(11) of the Act. In support of its position, the Petitioner argues that the MODs and that Assistant General Manager do not possess anything more than minor authority to assign and direct employees in routine tasks. Additionally, the Petitioner argues that the MODs and the Assistant General Manager's non-supervisory status is supported by secondary indicia.

### **IV) ANALYSIS**

The term "supervisor" is defined in Section 2(11) of the Act as follows:

[A]uthority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of merely routine or clerical nature, but requires the use of independent judgment. 29 U.S.C. § 152(11).

It is well settled that Section 2(11) of the Act is to be read in the disjunctive and that possession of any one of the enumerated indicia establishes supervisory status as long as the performance of the function is not routine or clerical in nature but rather requires a significant degree of independent judgment. *Stephens Produce Co., Inc.*, 214 NLRB 131 (1974); *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). "A worker is presumed to be a statutory employee and the burden of proving a worker is a supervisor within the meaning of Section 2(11) of the Act falls on the party who would remove the worker from the class of workers protected by the Act." *Hicks Oil & Hickgas, Inc.*, 293 NLRB 84 (1989); *Kentucky River Community Care, supra*. "The Board has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights, which the Act is intended to protect." *Hydro Conduit Corp.*, 254 NLRB 433 (1981).

#### **A) MODs**

In the present case, I find that the Employer has failed to meet its burden that the MODs are statutory supervisors. The focus of the Employer's evidence is on the MODs' authority to assign, responsibly direct, and to discipline other employees. However, the entire record demonstrates that the MODs have only limited authority to assign and to direct employees and that the MODs' assignments and directions are not based on independent judgment. The record also demonstrates that the MODs lack sufficient authority to discipline or effectively recommend discipline for the non-MOD employees. Additionally, the secondary indicia present in this case support my finding that MODs are employees, and not supervisors.

## 1) Authority to Assign Work and to Responsibly Direct Employees

The Board has held that “the exercise of the authority to assign or direct work, when exercised in a merely routine, perfunctory, or sporadic manner does not confer supervisory status on an employee; and employees who are merely conduits for relaying management information to other employees are not true supervisors.” *Delta Mills, Inc.*, 287 NLRB 367, 370-71 (1987). See also *Esco Corporation*, 298 NLRB 837, (1990) (finding the individual who is referred to as “in charge” was not supervisor within the meaning of the Act because his assignment of routine tasks did not require much supervising beyond making sure that the tasks are completed.) In a recent decision, the Board agreed with the ALJ that five employees were not supervisors within the meaning of Section 2(11) of the Act because “[t]here [was] no evidence that any of the jobs assigned to the [employees] require[d] any particular skills, nor that the abilities of any of the employees who perform the jobs differed substantially, such that selecting a particular employee for a task would require independent judgment.” *Palagonia Bakery Co.*, 339 NLRB No. 74, slip op. at 4 (2003). See also *Los Angeles Water and Power Employees Assoc.* 340 NLRB No. 146 (2003); *Bozeman Deaconess Foundation*, 322 NLRB 1107 (1997).

In the present case, the record demonstrates that the MODs have the responsibility to ensure that the Employer’s opening and closing checklists are complete. Additionally, the record demonstrates that the MODs have the authority to assign people to specific positions and specific tasks during the course of the day.<sup>11</sup> However, to the extent that the MODs assign tasks to the other employees, I find that their assignments are not based on independent judgment. As stated above, the Board has repeatedly found that routine or perfunctory assignments do not require the level of independent judgment to imbue an employee with supervisory authority. See *ibid. Los Angeles Water and Power Employees Assoc.* Although the MODs testified that they assign tasks, the record demonstrates that the tasks are routine and perfunctory. For example, a majority of the closing duties include restocking items, turning off various equipment, and cleaning. The list of positions is equally telling. The position of “Hot Food,” “Pivot,” and “POS Food” collectively entail standing in a specified location, taking orders, passing the order to the next position, selling or offering products, and ringing the item up. There is no evidence in the record that the tasks the employees complete require significantly different employee skill levels or that one task is substantially more difficult than another. Rather, the record demonstrates that all of the employees possess the skills necessary to complete all of the assigned tasks and often employees work in various positions throughout the day without any significant direction.

Additionally, the Board has held that an employer’s orders and regulations may limit and circumscribe an employee’s ability to assign tasks with independent judgment. See *Dynamic Science, Inc.*, 334 NLRB No. 57 (2003); *Chevron Shipping Co.*, 317 NLRB 379 (1995). In the present case, the Employer has detailed checklists for the opening and closing procedures. Although there is evidence that the employees do not comply with the checklists at all times, the decision not to comply with a specific task appears to be based on custom, as much as the MODs’ independent discretion. Moreover, as mentioned above, there is limited evidence that MODs assign items from the checklist because the tasks themselves are routine and the employees quickly learn to complete the checklist without direction.

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<sup>11</sup> The record is less clear on the extent and degree to which the MODs exercise their authority to assign tasks to other employees. Briede, who testified that this authority exists, admitted that he is generally not present during the opening and closing of the Employer’s facility and is unsure of the extent and nature of the MODs’ assignment of specific tasks. The Board has held, however, that mere possession of authority is sufficient to establish supervisory status. See *Fred Meyer Alaska, Inc.*, 334 NLRB No. 94 (2001). Accordingly, we must look to the scope of the authority, rather than how it is exercised.

## 2) Authority to Discipline

Other than several conclusionary assertions made by Briede, the record fails to demonstrate that the MODs have the authority to discipline or effectively recommend discipline of other employees. The record disclosed only a single instance where an MOD was involved in employee John Persak's discipline. In that situation, MOD Corwin contacted Briede about Persak leaving without permission. There is no evidence in the record that Corwin attempted to discipline Persak prior to speaking with Briede. Briede testified that he solicited Corwin's opinion and that Corwin suggested that the employee should be fired. After further discussions, however, Briede and Vickers, who was Acting General Manager at the time, decided not to terminate Persak and gave him another chance. Vickers' decision overruled Corwin's recommendation and demonstrates that Corwin lacked the authority to effectively recommend discipline of Persak.<sup>12</sup>

The Employer argues in its brief that the MODs have the authority to issue "formal disciplinary warnings" to employees. Additionally, the MODs testified that they believe they have the authority to discipline other employees. However, the Employer presented only one instance where a MOD engaged in a verbal warning of another employee. A single verbal warning is insufficient to establish supervisory authority. See *Ken-Crest Services*, 335 NLRB 777, (2001); *Vencor Hospital*, 328 NLRB 1136 (1999). MODs further testified that they were unaware of what actions they should take if a disciplinary situation arose, other than talking to the employee and contacting higher management. There is no evidence in the record that the MODs had any knowledge about the Employer's process or procedure for disciplining employees. Moreover, the Employer's list of MOD expectations does not include an expectation that MODs shall discipline employees or recommend discipline for other employees.

## 3) Secondary Indicia

The Board has held that where "the possession of any one of the [12 listed supervisory characteristics] is not conclusively established or "in borderline cases" the Board looks to well established secondary indicia, including the individual's job title or designation as a supervisor, attendance at supervisory meetings, job responsibilities, authority to grant time off etc., whether the individual possess a status separate and apart from that of rank-and-file employees." *Property Markets Group, Inc.*, 339 NLRB No. 32, slip op. at 11 (2003). See also *Monotech v. NLRB*, 376 F.2d 514, (1989) and *Palagonia Bakery Co, Inc.* 339 NLRB No. 74 (2003). The Board has also held that secondary indicia alone will not support a finding of supervisory status. See *Property Markets Group*, 339 NLRB at 11.

Although I realize the secondary indicia alone is not conclusive of supervisory status, the secondary indicia in the present case supports my finding that MODs are not supervisors within the meaning of the Act. First, there is no evidence that the MODs have different uniforms than other employees, attend management meetings, or receive training specific to their duties. Indeed, Briede testified that the employee handbook applies to all the employees, including the MODs. Second, there is unrefuted evidence a conceded employee, Caitlin Robertson, receives the same wages as the MODs. Third, the record establishes that the MODs do not have

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<sup>12</sup> Where recommendations concerning discipline and reward "were not shown to be effective or to result in personnel action being taken without resort to individual investigation by higher authority," a nonsupervisory determination followed. *Hawaiian Telephone Co.*, 186 NLRB 1 (1970). See also *Mower Lumber Co.*, 276 NLRB 766 (1985).

significant responsibilities, above and beyond the other employees. Rather, the MODs spend the large majority of their time engaged in the same work as the other employees.<sup>13</sup>

#### 4) Conclusion Regarding MODs

Based on the foregoing and the record evidence, I find, contrary to the Employer's arguments, that the MODs' exercise of authority to assign and direct employees is done so "in a merely routine, perfunctory, or sporadic manner" which does not rise to the level of supervisory status as defined in Section 2(11) of the Act. Moreover, the Employer's citation to *DST Industries*, 310 NLRB 957 (1993), in this regard, is misplaced. In *DST Industries*, supra, the employer operated "a highly **sophisticated** automotive, manufacturing facility where it is engaged in designing, displaying, and marketing present and future automobile prototypes and specialty automobiles, trucks, and vans for the automotive industry in general and specifically for the Ford Motor Company. The Employer also performs engineering and testing services on future car systems . . ." [Emphasis supplied.] Further, in *DST Industries*, supra, the Board accepted the Hearing Officer's findings that the individuals in question exercised independent judgment with respect to various job duties, including establishing job priorities, assigning work, and approving vacation requests while the same individuals also enjoyed special privileges and benefits reserved for supervisors and managers. In the case at hand, the Employer's operations simply are not sophisticated and, thus, the type of direction required is very much more limited than in *DST Industries*, supra. In contrast, the evidence, here, discloses that café/retail employees essentially greet the customers; explain the Employer's operations; take orders; grill and serve sandwiches; heat, pour, and serve soup; sell cheese products; and operate a cash register for the receipt of payments from customers. Thus, the Employer's operations are relatively simple and straightforward as revealed by the manner in which employees readily move from one task or position to another with relative ease. In this setting, café/retail employees need and actually receive very simple assignments and little direction, if any at all once they get past their initial employment. Under these circumstances, the MODs' routine, perfunctory, and sporadic exercise of authority to assign and direct employees does not rise to the level of supervisory status.

With respect to the Employer's argument that MODs possess the authority to discipline, the record reveals that MODs have not issued discipline and have not been told they have the authority to issue discipline beyond mere "coaching" which, as noted above, does not constitute discipline. Finally, with regard to the Employer's evidence of secondary indicia, such does not clear the hurdle that MODs lack primary indicia of supervisory status. Moreover, the secondary indicia support a finding that the primary indicia do not exist.

In view of the above and the record evidence, I find that the Employer has failed to meet its burden of establishing that MODs possess indicia of supervisory authority as that term is defined in Section 2(11) of the Act. Accordingly, I shall include the MODs in the unit sought by Petitioner.

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<sup>13</sup> In its brief, the Petitioner emphasizes that if I found that the MODs were supervisors, the café/retail facility would have five individuals to supervise the work of three full time and four part time employees. The Petitioner argues that this would create an unreasonably high ratio of supervisors to employees. In response, the Employer argues that in several months the Employer will hire two to three times the number of current employees in expectation of the summer's increase in business. Although this increase in hiring is speculative at this point, I have declined to rely on the supervisor to employee ratio in making this decision. It is clear from the record, that even in the absence of any secondary indicia, the MODs do not possess sufficient primary indicia of supervisory authority.

## **B) Assistant General Manager Darren Vickers**

I find that prior to becoming the Assistant General Manager, Vickers possessed sufficient primary indicia of supervisory authority to be a supervisor under the Act. The record contains uncontested evidence that Vickers hired, fired, and laid off numerous employees while he was the Acting General Manager. The Employer contends that Vickers continues to possess the same or nearly the same authority as when he was the Acting General Manager. Moreover, to the extent Vickers does not possess supervisory authority, the Employer argues he should nonetheless be excluded because Vickers is training to become a manager.

Although I believe that the Employer's arguments may bear fruit as time passes, on the record before me, I have found the evidence insufficient to conclusively decide that Vickers is a statutory supervisor. I am particularly cognizant of the fact that Vickers has only been the Assistant General Manager for two weeks. Additionally, prior to Vickers becoming the Assistant General Manager, there is no evidence that the position existed or was part of the Employer's business plan. The record does not contain a job description for the Assistant General Manager or any documentary evidence concerning the responsibilities and duties of the Assistant General Manager. The only evidence that Vickers possesses supervisory authority is Briede's testimony, which is largely ambiguous and contradicted by other witnesses. In view of the above and the record evidence, I find insufficient evidence exists to determine Vickers' supervisory and/or managerial status. Accordingly, I shall permit Vickers to vote subject to challenge.

## **V) CONCLUSION**

Based on the foregoing analysis and the record as a whole, I have found that the MODs are not supervisors with the meaning of Section 2(11) of the Act and shall permit them to vote in the election. I have also found that the evidence is insufficient to determine whether the Assistant General Manager is a supervisor within the meaning of the Act and shall permit him to vote in the election subject to challenge by either party. Accordingly, I direct that an election be held in the appropriate Unit described as follows:

All full-time and regular part-time employees and Managers on Duty employed by the Employer in its Café/Retail operations located at Pike Place Market in Seattle, Washington; excluding the Café/Retail General Manager, the Cheese Maker Manager, the cheese production employee, confidential employees, guards, and supervisors as defined by the Act.

There are approximately eleven employees in the Unit.

## **VI) DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the Unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the Unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause

since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by United Food and Commercial Workers Union, Local #1105, Chartered by United Food and Commercial Workers International Union, AFL-CIO, CLC.

#### **A) List of Voters**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 19 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office, 915 Second Avenue, 29<sup>th</sup> Floor, Seattle, Washington 98174, on or before March 3, 2004. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (206) 220-6305. Since the list is to be made available to all parties to the election, please furnish a total of four copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

#### **B) Notice Posting Obligations**

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

#### **C) Right to Request Review**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to

the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by March 10, 2004.

**DATED** at Seattle, Washington, this 25th day of February 2004.

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Richard L. Ahearn, Regional Director  
National Labor Relations Board, Region 19  
2948 Jackson Federal Building  
915 Second Avenue  
Seattle, Washington 98174

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